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165-316

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
JOSHUA GORHAM, APPELLEE. } No. 187.

ASSIGNMENT OF ERRORS.

BRIEF OF CHARLES B. HOWRY, ASSISTANT ATTORNEY-GENERAL, FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
JOSHUA GORHAM, APPELLEE.
No. 187.

ASSIGNMENT OF ERRORS.

Come the United States, by the Assistant Attorney-General charged with the defense of Indian depredation claims, and say that the conclusions of law announced by the Court of Claims in this cause were erroneous and the judgment rendered upon these conclusions wrongful, and for causes of error the United States say:

(1) The Court of Claims was without jurisdiction to render judgment against the United States alone, but was only authorized to render judgment jointly against the United States and the band, tribe, or nation of Indians to whom the Indian or Indians belonged who committed the depredation.

(2) The United States can not be sued alone for depredations committed by unknown Indians, bands or

tribes of Indians, and the court erred in entering judgment against the United States after having dismissed the suit as to the defendant Indians.

Wherefore the United States asks the court to reverse the judgment of the Court of Claims and to dismiss said cause.

CHAS. B. HOWRY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
JOSHUA GORHAM, APPELLEE. } No. 187.

STATEMENT AND BRIEF FOR APPELLANT.

STATEMENT.

Joshua Gorham, the appellee in this case, on June 5, 1893, recovered a judgment in the Court of Claims against the United States for property claimed to have been taken or stolen by two tribes of Indians named in his petition. The petition having been dismissed as to the two tribes of Indians, because they were unknown and could not be identified, the court then proceeded to ascertain the value of the property lost and to render judgment therefor against the United States alone. The suit was brought under the act of March 3, 1891 (26 Stat. L., 851), conferring jurisdiction upon the Court of

Claims to determine and adjudicate certain classes of Indian depredation claims. The United States moved for a new trial for two reasons:

(1) Because the court had no jurisdiction to render judgment against the United States alone, when the tribe of Indians to whom the alleged depredators belonged were unknown and could not be ascertained, but under the act of March 3, 1891, the court was authorized to enter no judgment, except when the judgment could also be entered jointly against the tribe of Indians committing the depredation.

(2) Because on a new trial the United States intended to show that the tribe or band of Indians committing the depredation was not in amity with the United States.

On February 19, 1894, the court refused this motion for a new trial, holding, among other things, that it had jurisdiction to render a judgment under the act of March 3, 1891, against the United States as the sole party defendant when the Indian or Indians, tribe or band of Indians who committed the depredation were unknown and could not be ascertained, or could not be identified. From this decision the United States brings the case to this court for review.

ARGUMENT.

The errors assigned in this court challenge the correctness of the decision of the trial court.

Appellant contends that under the act of March 3, 1891, the Court of Claims has no jurisdiction to render judgment against the United States alone, but is only authorized to render judgment jointly against the United

States and the band, tribe, or nation of Indians to whom the Indians or Indian belonged who committed the depredation.

Secondly, the United States can not be sued alone for depredations committed by unknown Indians or bands or tribes of Indians.

In determining this question it is necessary to ascertain what jurisdiction is conferred upon the Court of Claims by this act. The Court of Claims is a court of special and limited jurisdiction. It has no jurisdiction other than that expressly conferred by statute.

> *Schillinger* v. *United States*, 155 U. S., 163.
> *Johnson* v. *United States*, 160 U. S., 546.

The suit in the case at bar is for a tort; that is, for the depredations of Indians. In the Schillinger Case, *ante*, this court has declared that the Court of Claims has no jurisdiction of a claim against the Government for a mere tort even of its own officers under the act defining the claims which could be submitted to that court for adjudication by the *act of February 24, 1855*, chap. 122, (10 Stats., 612), nor under the new jurisdictional *Act of March 3, 1887*, chap. 359 (24 Stats., 505). In *Johnson* v. *The United States*, *ante*, it is said, referring to the Court of Claims: "That court has no general jurisdiction over claims against the United States. It can take cognizance of only those matters which by the terms of some act of Congress are committed to it."

And referring to the Indian depredation act of March 3, 1891, in the Johnson Case, it is declared by this court:

> Congress did not by the act of 1891, assume in behalf of the United States, responsibility for *all*

> acts of depredation by Indians, nor grant to the Court of Claims authority to inquire into and finally adjudicate all claims therefor. It carefully specified those which might be considered by that court.

Under the jurisdictional clauses of the act under which the suit at bar was brought the Court of Claims is given jurisdiction and authority to inquire into and finally adjudicate all claims of the following classes and none other:

> First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.
>
> Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department; and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and under subsequent acts, subject, however, to the limitations hereinafter provided.
>
> Third. All just offsets and counterclaims to any claim of either of the preceding classes which may be before such court for determination.

Under these clauses there are three things necessary to give the court jurisdiction.

First. The property taken or destroyed must have been the property of a citizen of the United States at the time the depredation was committed.

Second. The depredation must have been committed by an Indian or Indians.

Third. The Indians committing the depredation must have belonged to a tribe, band, or nation in amity with the United States.

Each of these jurisdictional facts must be set out in the petition of claimant, and unless so set out the petition would be demurrable. Each fact must be proved before the claimant is entitled to any judgment. If he fails in proving either fact his case fails and the petition must be dismissed.

The act under which the suit was brought did not allow any claim nor create any liability upon the part of the Government. It merely provides a method of adjudicating claims which existed under statutes extending back to so remote a period as 1796. The trade and intercourse laws with the Indians of 1834 are, however, the basis of the act of March 3, 1891, which merely provides in conferring jurisdiction upon the Court of Claims a method of treating claims existing at that time and converting a contingent liability of the United States into an absolute payment from the Treasury. In the language of an eminent man in public life who was one of those most responsible for the passage of the law, the jurisdictional act of 1891 did not "create an obligation on the part of the United States to pay one dollar which it was not before the passage of that statute bound to pay eventually."

If the depredation is known to have been committed by whites, Mexicans, or persons of any other nationality

than Indians, then it is clear the Court of Claims has no jurisdiction. The case is not within this statute. If it be shown that Indians committed the depredation the case must still fail, unless it is further shown that the Indians belonged to a tribe or band in amity with the United States. If the depredation is committed by naturalized Indians, or those who have renounced their tribal relations and become citizens of the United States, then the Court of Claims has no jurisdiction. Such depredations are not provided for under this act, but are subject to penalties inflicted under the laws of the United States against its citizens, and triable by other courts of the United States.

In discussing this statute and the term "amity" used therein and its meaning, this court, in the case of *Leighton* v. *United States* (161 U. S., 291), says: "The *condition* of *liability* prescribed in the first jurisdictional clause of the first section does not exist, because by the finding the *Indians who committed the depredation* did not belong to a *tribe in amity* with the United States." This being true, in order to give the Court of Claims jurisdiction under this statute and authorize any judgment for recovery, it is indispensably necessary to identify the persons committing the depredation as Indians, and further to identify them as belonging to some tribe or band in *amity* with the United States. How can it be shown that they belonged to a tribe or band of Indians in *amity* with the United States unless the band or tribe is known or identified? It is impossible to say that the Indians belonged to a tribe or band in amity with the United

States unless the particular band or tribe is known and proven. If recovery can be had by a claimant without such proof, then that relation of amity required in the act is rendered of no avail, and is avoided by such interpretation.

The provisions of the act prescribing the manner and rules for suing under said act, as contained in sections 3 and 4, provide that the band or tribe of Indians to which the depredators belong shall be joined as defendants, and that the Attorney-General of the United States shall make defense for the United States and *the Indians*, or the Indians can make separate defense.

Section 5 of the act prescribes, among other things, how and against whom judgment shall be rendered. The last clause of that section is as follows:

> That the court shall determine in each case the value of the property taken or destroyed at the time and place of loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claims against the United States and against the tribe of Indians committing the wrong, when such can be identified.

It is mainly this section of the statutes that the Court of Claims interprets as giving it authority to render judgment against the United States alone, when the band or tribe of Indians is unknown or can not be determined. This section is no part of the jurisdictional clause of the statute, and does not determine the *rule* of *liability*. Unless the prerequisites to *liability* named in the jurisdictional clauses of the statute are established, then *no*

judgment can be rendered. This court, in the case of *Leighton* v. *United States*, *supra*, referring to section 5 of this act, says:

> The clause quoted from section 5 (being the same clause quoted in this brief) does not *determine* the *rule* of *liability*, but only the *duty* of the court when the *liability has been established.*

What, then, is the condition of liability in the case of an allowed claim which either party shall elect to reopen? It must be found in some act of Congress, and is either that prescribed in the first clause of the first section of this act or in some other statute. The *condition* of *liability* prescribed in the jurisdictional clause of the first section does not exist, because by the finding the Indians who committed the depredation did not belong to a *tribe* in *amity* with the United States.

In *Marks* v. *United States* (161 U. S., 297), discussing this same statute, this court says:

> What Congress intended was that when, as a matter of fact, a tribe was in the relation of actual peace with the United States, and by some individual or individuals, without the consent or approval of the tribe, a depredation was committed upon the property of the citizens of the United States, *such depredation might be investigated* and the amount of the loss determined and adjudicated by the Court of Claims.

In the light of this conclusion it may be said that *when* the *petition* filed in the Court of Claims alleges that a depredation was committed by an *Indian* or *Indians belonging* to a *tribe* in *amity* with the United States, it becomes the

duty of the court to inquire as to the *truth* of *that allegation*, and its truth is not determined by the mere existence of a treaty between the United States and the tribe or the fact that such treaty has never been formally abrogated by a declaration on the part of either, but that the inquiry is whether, as a matter of fact, *the tribe* was at the time, *as a tribe*, in a state of actual peace with the United States. If so, and the depredation was committed by a single individual or a few individuals without the consent and the knowledge of the *tribe*, the court may proceed to *investigate* the *amount of the loss* and render *judgment* therefor. If, on the other hand, the tribe, as a tribe, was engaged in actual hostilities with the United States, the *judgment* of the Court of Claims *must* be that the allegation of the petition is *not sustained*, and that the claim is not one *within* its *province* to *adjudicate*.

It being true, then, that a petition to recover under the statute can not be sustained and no judgment entered unless it be first proved that the depredation was committed by Indians belonging to a tribe, which, *as a tribe*, was in actual peace with the United States, by what authority can the court enter judgment against the United States alone when the tribe is not known and can not be ascertained? How is the court to know the depredation was committed by Indians belonging to a *tribe* in *amity* with the United States or by Indians at all? To render a judgment under such circumstances is to defeat and nullify the obvious and declared intention of the statutes.

The last words to section 5 of the act, to wit, "when such can be identified," can have but one meaning which harmonizes with the object and purposes of the act, and that is, they limit the right of the court to render judgment against the United States as well as against the tribe of Indians unless the tribe can be identified. For instance, the sixth section proceeds to prescribe how *any judgment* so *rendered* against any tribe of Indians shall become a charge against such tribe and how the same shall be paid, etc. And in the event of failure of funds on part of such Indian tribe, that the United States shall pay same. The statute in none of its parts provides for suit or judgment against the United States alone. It is absolutely necessary that the band or tribe of Indians committing the wrong must be joined in the suit, and it must be shown by proof, in order to authorize any recovery, that such tribe, as a tribe, was in amity with the United States, and then a joint judgment must be rendered.

As said by this court in an able opinion delivered in *Leighton* v. *United States*, section 5 of the act does not *determine* the *rule of liability*, and again in *Marks* v. *United States* this court says that the Court of Claims must first determine the *question*, whether *such tribe, as a tribe*, was in a state of actual peace with the United States at the time of the depredation. This being determined, then it has jurisdiction and may proceed to inquire into the amount of the loss; but if claimant fails to establish amity with the United States on the part of such tribe, then the court has no jurisdiction to proceed any further.

It can not determine the amount of the loss, nor render any judgment. It follows as a necessary corollary from this proposition that *no judgment* can be rendered until the *tribe* is *ascertained* and *identified*. The statute provides that judgment must be rendered against such tribe jointly with the United States. Therefore the judgment of the court below is manifestly erroneous, and should be reversed and a new trial awarded.

CHARLES B. HOWRY,
Assistant Attorney-General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, *Appellant*,
vs.
JOSHUA GORHAM, *Appellee*.

No. 187.

Statement and Argument for Appellee.

JNO. WHARTON CLARK,
Attorney for Appellee.

NATIONAL PUB. CO., PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, *Appellant*,
vs.
JOSHUA GORHAM, *Appellee*.

No. 187.

Statement and Argument for Appellee.

STATEMENT.

The Court of Claims found as facts in this case, that Joshua Gorham, claimant, was a citizen of the United States, at the time of the loss of his property, in January, 1868; that he owned the property alleged in his petition; that the property was destroyed or taken from him by Indians of an unknown tribe, at the time in amity with the United States, as evidenced by the fact that it did not appear that any Indian troubles existed at the time of the depredation; and that the property was taken without just cause or provocation. And upon those facts the Court decided that the claimant should recover from the United States the sum of $1,300.00, and that the petition against the Kiowa and Comanche tribes of Indians should be dismissed.

The United States then moved for a new trial, assigning five errors, three of fact and two of law. They are the only

errors assigned in this Court, and appellant's discussion in this case should be confined to the errors assigned. (Record, p. 3.)

This motion for a new trial was argued before the Court of Claims, and that Court overruled the motion. Thereupon the United States appealed to this Court.

ARGUMENT.

The single question raised by the counsel of the appellant in his brief is has the Court of Claims jurisdiction, under the Act of March 3, 1891, to render a judgment against the United States alone, where the tribe of Indians to which the depredators belonged cannot be identified; or is that jurisdition confined to the rendition of judgments, jointly, against the United States and the tribe or tribes of Indians "committing the wrong" in every suit for loss by Indian depredations?

The proposition that the Court of Claims is not a Court of general Common Law Jurisdiction is not questioned. This Court has often decided that the Court has no jurisdiction other than that conferred by statute. We must look to the statute itself, therefore, to ascertain the scope of jurisdiction conferred upon the Court of Claims in respect of Indian depredation claims.

This Court, confirming the Court of Claims, has already determined that the jurisdiction under that act is confined to claimants who were citizens of the United States at the time the loss occurred, and to Indian tribes, which, as such, were at peace with the United States at that time. That alien claims and war claims are not within the act. Johnson v. United States, (160 U. S., 546.) Leighton v. United States (161 U. S., 291.) Marks v. United States (161 U. S., 297.)

Counsel for the appellant suggests to the Court that this suit, being for an Indian depredation, is for a tort, and infers that, therefore, the Court is without jurisdiction to render a judgment against the United States. He cites in support of his inference the case of Schillinger v. United States (155 U. S., 163.)

The Schillinger case raised the question whether or not the statutes giving general jurisdiction to the Court of Claims conferred jurisdiction upon that Court to determine a claim for the tortuous act of an officer of the United States, where the claimant had not specifically waived the tort and sued on implied contract. This Court held that the Court of Claims had not such jurisdiction under those statutes, and quoted and reaffirmed what it said in the case of Morgan v. United States (14 Wall., 531-534): "Congress has wisely reserved to itself the right to give or withhold relief when the claim is founded on the wrongful proceedings of an officer of the Government."

That rule has no application in this case under this *special act*. And although Congress may have wisely reserved to itself to give or withhold relief in tortuous actions, yet it would seem that it could with more wisdom unload upon a competent court the labor of judicially determining such suits, especially where large numbers of them have accumulated as in this class of cases. But whether wisely or not, the fact is, Congress has given the Court of Claims jurisdiction of certain Indian Depredation Claims, all of the same nature and all arising from the wrongful acts of the Indian depredators, and yet, the United States is expressly made party defendant to each and every suit.

If the Court of Claims has jurisdiction to render a judgment at all, even jointly with an Indian tribe, and that cannot be seriously questioned, it is difficult to see why a judgment cannot as reasonably be rendered in these cases against the United States alone, where the Indian tribe is unknown and cannot be proved, so far as the nature of the action is concerned. To determine otherwise would lead to the absurdity that the Court could render a judgment against the United States and a tribe of Indians because that action was not a tort; but that it could not render a judgment against the United States alone, where the tribe could not be proved, because that action of the same kind and nature precisely was a tort. That would be equivalent to holding that the nature of the action depended upon the parties to the suit. Of course

that could not be. The same reasoning is true if these actions are deemed, so far as the United States is concerned, to be a waiver of the tort, and an action on implied contract. If they are implied contracts where the Indian tribes can be identified, then they are implied contracts when they cannot be identified. The United States came voluntarily into these suits, and stand on the same footing as any other litigant, no more favored or no less. United States v. Arredondo et el. (6 Peters, p. 711.) United States v. Klein (13 Wall., p. 144.)

What is termed the policy of the Government not to give relief in actions of tort would not perhaps be sufficient ground on which to base a judgment in any case. Haden v. The Collector (5 Wall., 107-111). Manifestly, it could not control the plainly expressed intent of Congress in this *special act*. The Indian defendants in these suits can commit torts and did commit them, and the United States, in honesty to its citizens, has made itself a party to these suits, and liable for the acts of the Indians, against whom, on account of and in pursuance of the policy of the Government, citizens of the United States could not seek or obtain private satisfaction, or in any way enforce a claim.

Counsel for appellant, in his brief, p. 4, says: "The act under which the suit is brought did not allow any claim or create any liability upon the part of the Government. It merely provided a method of adjudicating claims which existed under statutes extending back to so remote a period as 1796. The trade and intercourse laws with the Indians of 1834 are, however, the basis of the act of March 3, 1891."

If the above statement were entirely accurate it would not it is urged affect claimant's right of recovery in this case; but the statement is not accurate and will be examined briefly, though it is suggested before doing so that this statute is so plain as to the matter in controversy that the Court, it is believed, will consider it its own interpreter without recourse to any other source whatsoever.

Not alone is section 17, of this act 1834 (4 Stat. p. 731), brought forward into the Rev. Stat., Section 2156, and which

is essentially the same as Section 14 of the act of May 19, 1796, Section 14 of the act of March 3, 1799 (1 Stat. 472 and 747), and Section 14 of the act of 1802 (2 Stat. 143), the basis for this act of March 3, 1891; but the act of March 3, 1885 (23 Stat. 376), likewise forms part of that basis. The former laws are doubtless the foundation for what Mr. Justice Brewer by a happy and graphic expression in giving the opinion of the Court in the Leighton Case, termed "the condition of liability" of the Indian tribe committing the wrong; while the latter is the foundation for "the condition of liability" of citizenship of the claimant. But these acts, or any of them, or all the acts *in pari materia* taken together do not furnish a complete guide for the procedure under this act or the liability of the United States or of the Indian tribes. The procedure under this act is radically and essentially different from that under any and all the preceding acts, and the liability more fixed and broader. By this act the United States is for the first time made a direct party defendant to each and every suit, thus becoming primarily liable, and as expressed by this Court in the Leighton case, in what seems to appellee to be a true interpretation on this point, "in case of an award by the Court of Claims the United States becomes in fact, if not in form, the primary and solvent debtor." But on the other hand the United States is by this act for the first time empowered to set up "any counter-claim, set-off, claim for damages, or demand" it may have as well as those of the Indians against these depredation claims. (Section 4.)

And not only are the annuities of the Indian tribe made liable for their depredations under this act, but also "any other funds due said tribes from the United States, arising from the sale of their lands or otherwise," and even "appropriations for the benefit of said tribe," other than those for current and necessary support, subsistence and education. On the other hand, likewise, the Indians are by this act for the first time empowered to set up against depredation claims "all just off-sets and counter-claims." (Section 1.)

In the matter of procedure this is a marked departure from all former acts and that seems to have misled counsel

for appellant in his attempt to cast this act in the form of prior acts. He confused the "*condition of liability*" under the act 1834 with the *manner* of presenting claims under that act. The "condition of liability" that the Indian depredators must belong to tribes in amity with the United States is preserved in tact under this statute; but the manner of presenting claims is specifically waived by Section 2.

The act of 1834 provided that the claimant or his agent may make application to the superintendent, agent, or subagent of the Indians, who under the direction of the Secretary of the Interior made application to the Indian tribe for payment. Few if any claims were presented in the manner prescribed in that act, and the procedure under it became inoperative chiefly because the Indians, almost universally, denied all knowledge of the theft, and such presentation was a fruitless effort to collect. The actual procedure under the prior acts was to present the claim direct to the Interior Department of the Government through the Commissioner of Indian Affairs. Section 2 of the act of 1891, having a view to the fact that claims had not been presented in the *manner* prescribed in prior acts, specifically *waived* the manner of presenting claims under those acts.

"That all questions as to limitations as to time and *manner of presenting claims* are hereby waived, and no claim shall be excluded from the jurisdiction of the Court because not heretofore presented to the Secretary of the Interior or *other officer* or department of the Government."

But threre is nothing in the 17th section of the act of 1834 that would preclude a claimant, who lost property by Indians of an unknown tribe in amity with the United States, from being paid by the United States under the guarantee clause of that act. It provided as follows: "And, in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party so injured an eventual indemnification." In respect to property how taken, stolen or destroyed? Why, manifestly, taken, stolen or destroyed by "any Indian or Indians belonging to any tribe in amity with the United States," "within the Indian country," "or in

any State or territory inhabited by citizens of the United States," and belonging to a "citizen or inhabitant of the United States." Just that and nothing more. However, it is not the act of 1834 that the Court must interpret, but the act of 1891, in which the intent of Congress is so plainly expressed, as to the question raised in this case, that the aid of the former act will not be needed and cannot be invoked. For whether claims for loss by Indian depredations, where the tribe committing the wrongful act cannot be identified, are within the former act or not, they are clearly within the act of 1891.

Counsel for appellant further contends that judgment cannot be rendered against the United States alone, where the tribe of Indians to which the depredators belong cannot be identified, because "it is impossible to say that the Indians belonged to a tribe or band in amity with the United States unless the particular tribe is known and proved" and, hence, he urges that the judgment of this Court, in the Leighton Case, is violated by the decision of the Court below, where this Court says: "The condition of liability prescribed in the first jurisdictional clause of the first section does not exist, because by the *finding* the Indians who committed the depredation did not belong to a tribe in amity with the United States."

There is no such *finding* in this case. On the contrary, there is a *specific finding* that "the tribe of Indians committing the wrong" was in amity with the United States. The condition of liability—amity of the tribe to which the depredators belonged—was considered by the Court and determined by the Court, and there is nothing in the record here to show that its determination was not right.

But it is urged that to determine that a tribe of Indians which cannot be identified is in amity with the United States is not within the realm of possibility. That position is certainly not a true one. For where depredations have been committed in such a manner as to fix the loss upon *Indians* and the different tribes which could have reasonably been charged with the theft, as evidenced by their proximity to the place where

the depredation was committed and their custom of raiding in that vicinity, are at peace with the United States at the time the depredation was committed, the Court could not only reasonably determine that the depredators, belonging to whichsoever of those tribes they may, were unknown Indians belonging to a tribe in amity with the United States, but, indeed, it would be its plain duty to so determine, under the express provisions of the act of 1891. To so hold would not, as declared by counsel for appellant, "defeat and annul the obvious and declared intention of the statute," but carry out the manifest and expressed intent of Congress in the statute.

Counsel asks: "How is the Court to know the depredation was committed by Indians belonging to a tribe in amity with the United States or by Indians at all?" We answer from relevent and competent evidence as in any other case coming under this law, and as was before the Court in this case.

Counsel overlooks entirely that the Indian depredators may be proved by circumstantial evidence. And yet the circumstances might be so strong as to certainly fix the loss upon Indians, and also every tribe to which those Indians could possibly have belonged be at peace with the United States. For, suppose that a depredation had been committed near the Indian Territory, the home of most of the Indian tribes, and a *large number* of stock taken, a method of stealing characteristic of Indian and not white thieves; that the trail of the depredators had been followed for a long distance, toward and near to the boundary line of said Territory; that on the range where the stock was stolen and on the trail were found some of the stock shot with arrows—missiles of destruction used by Indians alone; and that arrows and other Indian implements were found scattered upon the trail. Under these circumstances could not the Court reasonably have determined that Indians committed the depredation? Would it not be compelled to so determine from such evidence in a case even though it might be impossible to prove the particular tribe to which the depredators belonged? But suppose that all the tribes to which the depredators could have belonged were at peace with the

United States; "that it did not appear at the time that there were any Indian troubles." Under those circumstances would not the Court of Claims have jurisdiction under this statute? Would not the plainly expressed intent of the statute require that judgment be rendered in favor of a claimant so far as the amity question is concerned? In such a case, manifestly, the condition of liability that the tribe must be in amity with the United States would be fully complied with.

There are two ways in which the tribe to which a party of Indian depredators belong can be identified. One way would be to kill one of the Indians, and the other way would be to capture one of them, while in the act or while in possession of the property, and then have the tribe to which such Indians belonged or an expert determine their tribal relations. A possible third way of identification would be by pursuing the depredators upon their reservation, and there while they were in possession of the property, call upon the chiefs and head-men to own the thieves as of their tribe. In most instances, however, it would not be possible to fix the tribe in this way, for, if the tribe did not disown the thieves altogether in such a case, as is extremely probable, at any rate the pursuers, as well soldier as civilian, were not alolwed to follow the depredators within the confines of their reservations. Few Indians, while on these depredating expeditions, were ever killed and fewer ever captured. It is not necessary to say that the large majority of citizens who suffered losses were not sufficiently familiar with the different tribes to identify, with certainty, the tribe to which the depredators belonged. In point of fact, too, these depredating parties were usually made up of individuals from different tribes. So that if the jurisdiction of the Court depended upon a strict proof of the identical tribe to which the depredators belonged it would be extremely limited. The claimants in these Indian depredation cases charged their losses to some particular tribe or tribes not because they particularly identified the depredators, as belonging to those tribes, but because they knew that Indians belonging to those tribes were in the habit of committing depredations in that particular locality. Congress was well

aware of this inherent difficulty, made more difficult by the policy of the Government to restrain its citizens from armed conflicts with the Indians by discouraging pursuit of the Indians and preventing pursuit of them upon their reservations, and so framed this statute accordingly.

The general and cardinal intent of Congress as expressed in the act of March 3, 1891, is manifestly to pay citizens of the United States for depredations by Indians, when the tribe to which the depredators belonged were in amity with the United States. The proof of the amity of the tribe committing the wrong, like any other material fact, must be by the best evidence of which the nature of the case is susceptible. But whatever that proof may be it does not affect that intent. Further more the intent of Congress, expressed in a number of the sections of this statute, obviously is that judgment shall be rendered against the United States alone, where the tribe to which the Indian depredators belonged cannot be identified. The able opinion in the Court of Claims in this case by Nott, J., shows beyond cavile the view taken by counsel for appellant; that, under this statute, judgment shall be rendered only where the tribe to which the depredators belonged is identified, is out of harmony with the statute. (Record pp. 4-8.) It would seem that the argument of the Court should be conclusive of this matter, and appellee will only refer to some of the more salient points, and perhaps offer a few suggestions in the line of the Court's argument.

If Congress intended that judgment should be rendered, under this statute, only where the tribe to which the Indian depredators belonged and the United States are made joint defendants, why was it only necessary for the claimant to allege in his petition "the persons, classes of persons, tribe or tribes, or bands of Indians by whom the alleged illegal acts were committed, *as near as may be?*" (Section 3.) If after all it is necesssary to prove the tribe committing the wrong absolutely, then the clause "as near as may be" is a snare and a delusion to the pleader. Congress intended nothing of that kind.

On the hypothesis of the counsel for the appellant, the 5th

section, which was made for the guidance of the Court, is, if possible, even more misleading. Among other things it provides: "That the Court shall determine in each case the value of the property taken or destroyed at the time, and the place of the loss or destruction, and *if possible* the tribe of Indians or other persons by whom the wrong was committed."

Why did Congress through the express terms of this statute permit such latitude to the Court in making its findings, if it is necessary to determine in all cases some tribe as the wrong-doer? Were the words "if possible" placed in this act to mislead the Court in making its findings? But, if not, then for what reason, unless they were intended to permit the Court to render judgment against the United States alone as defendant, when it was *not possible* to determine the tribe or other persons committing the wrong.

But this section further provides that the Court "shall render judgment in favor of claimant or claimants against the United States" *always* "and against the tribe of Indians committing the wrong, *when such tribe can be identified.*" Does this clause mean that judgment can be rendered by the Court only when the tribe of Indians can be identified? If so, then why were the words "when such tribe can be identified" added to the direction of the Court as to judgment at all. It has no significance whatever if that is the case, and is worse than surplusage, for it is a positive blind. Congress intended to practice no such legerdemain on the Court as that, and this Court will not countenance such a proposition.

Why was it made obligatory in section 8, where alone payment for judgment by an appropriation by Congress is provided, for the Attorney General to "transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this act, in favor of claimants and against the *United States and not paid as hereinbefore provided*," if suit must be against the United States and the tribe of Indians committing the wrongful act in every case and judgment must be rendered against them as joint defendants. No mention whatever is made of judgments against the Indian tribes or against the United States and such tribes jointly in this section. It

provides for the payment of judgments against the United States alone where the tribe committing the wrong can not be identified. It can mean that and that only.

The meaning of section 8 becomes apparent when considered with section 6. Section 6 provides for the payment of judgments in claims where the Indian tribes are parties defendant, and in each and every claim where an Indian tribe or tribes is a party defendant. The amount of the judgment in all such claims "shall be charged against the *tribe* by which, or by members of which the Court shall find that the depredation was committed." And in all such claims the amount of the judgment so rendered "shall be deducted and paid in the following manner: "First, from the annuities due said tribe from the United States; second, if no annuities are due or available, then, from other funds due said tribe, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence and education; and, fourth, if no such *annuity, fund, or appropriation* is due and available, then the amount of the judgment *shall* be paid from the *Treasury of the United States.*"

Manifestly, these *four sources* of payment are open, and the *only ones* open to claimants who obtain a judgment against an Indian tribe and the United States jointly. From these four sources are paid all the judgments in which an Indian tribe is a party to the suit. What other conceivable judgment against the Indian tribes is not payable from these four sources found in this 6th section? Obviously, it is the expressed intent of Congress to pay out of the funds in the Treasury, not otherwise appropriated, all judgments against any Indian tribe, where the first three sources failed, i. e. where such tribe has no "annuities due," no "funds" arising from the sale of lands or otherwise no "appropriations due or available." And the settlement between the Indian tribes and the United States as to the amounts thus paid for such Indian tribes becomes a mere matter of book-keeping in the Treasury.

But section 8 provides payment for another class of judgments not covered by Section 6. They are judgments "rendered in pursuance of this act, in favor of claimants and against the *United States and not paid as hereinbefore provided.*" How provided? Where provided? Beyond quibble, provided from "the annuities due" the Indian tribes against which judgments are rendered, from the "funds" due such Indian tribes, arising from the sale of their lands and otherwise, and from "appropriations" due and available, and from the "Treasury" of the United States when these three sources fail. All provided for in section 6, without the necessity or requirement of an appropriation by Congress. Section 8, therefore, applies and can only apply to payments by appropriation from Congress of judgments against the United States direct and alone, where there is no tribe of Indians or where the tribe to which the Indian depredators belonged can not be identified as in the case at bar. This is the only rational conclusion that can be arrived at in harmony with this entire statute, for the payment of all judgments against the United States and the Indian tribes is hereinbefore provided by section 6.

Then, this statute provides that the claimant shall allege in his petition the tribe of Indians committig the wrongful act only "*as near as may be*," excluding the idea of an absolute allegation, and the proof must follow the allegation. (Section 3.) It provides that the Court shall determine the tribe of Indians "*if possible*," inferring necessarily, that when it was not possible, then the determination shall be against the other party defendant, the United States alone. It provides that judgment shall be rendered against the United States, *always*, and against the Indian tribe committing the wrongful act also, "*when such tribe can be identified.*" But by necessary implication, when such tribe can *not* be identified, then judgment shall be rendered against the United States alone, for it is the only universal defendant in these cases. (Section 5.) It provides by an independent section for the payment of joint judgments against the United States and the Indian tribes. (Section 6.) It provides by a separate section for the payment of

judgments against the United States alone. (Section 8.) Thus, the sections of this statute, providing for the necessary allegations in claimant's petition, the findings of the Court, the judgment of the Court, and the payment of the judgment —the entire proceedings from beginning to end—is in harmony with the conclusion that judgment shall be rendered against the United States alone where the tribe to which the Indian depredators belonged can not be identified.

In conclusion, it is urged by appellee that this statute as respects the matter in controversy, is clearly within the catalogue of statutes in which the intent is plain, and in the words of Chief Justice Marshall, in Fishe v. Bright, et al., (pp. 358-386), in substance, so often since repeated by this Court: "Where the intent is plain, nothing is left for construction."

JOHN WHARTON CLARK.
Attorney for Appellee.

165-316

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165-316

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
JOSHUA GORHAM, APPELLEE.
} No. 187.

REPLY BRIEF OF CHARLES B. HOWRY, ASSISTANT ATTORNEY-GENERAL, FOR THE UNITED STATES.

(WITH APPENDIX.)

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
JOSHUA GORHAM, APPELLEE. } No. 187.

REPLY BRIEF FOR APPELLANT.

The subject-matter of the legislation under consideration is depredations committed within the territorial jurisdiction of the United States by members of Indian bands, tribes, or nations upon the property of citizens of the United States during a state of amity between the United States and such band, tribe, or nation. The depredations are by Indians living in tribal relations. It is not depredations committed by the United States in its capacity as sovereign, if such a situation is supposable, or depredations committed by agents or authorities or citizens of the United States under circumstances that render the United States primarily liable. The *primary liability* is against the Indian band, tribe, or nation of which the offending depredators are members; and the suits authorized under the jurisdictional act are for torts—that is, for the depredations of Indians—and any liability

assumed by the United States to indemnify the sufferers is *secondary* and is conditioned and limited by the express language of the statutes making provision for such indemnity.

The legislation of Congress relating to these depredations covers a period of nearly one hundred years, and examination of the several statutes shows that the rights, duties, and obligations of three parties are concerned and affected: First, the Indian bands, tribes, or nations occupying lands within the jurisdiction of the United States, or Indian bands, tribes, or nations crossing from foreign territory in the territory of the United States; second, the United States as sovereign of the territory, and third, unoffending citizens of the United States whose property has been appropriated or destroyed by members of some Indian band, tribe, or nation, at the time of the depredation "in amity with the United States."

This tripartite relation involves consideration of the rights, duties, and obligations of the several parties *inter sese*, namely, (*a*) the relative rights, duties, and obligations of the sovereign toward the Indian bands, tribes, nation, and (*b*) the relative rights, duties, and obligations of the sovereign toward its citizens.

But the relations existing between the United States and the Indians living in tribal relations is peculiar; and the condition of the Indians in relation to the United States has repeatedly been the subject of comment, of definition, and of description by this court. (*Cherokee Nation* v. *Georgia*, 5 Pet., 1; *Worcester* v. *Georgia*, 6 Pet., 536; *U. S.* v. *Holiday*, 3 Wall., 420; *Holden* v.

Joy, 17 Wall., 237; *Elk* v. *Wilkins*, 112 U. S., 108; *U. S.* v. *Kagama*, 118 U. S., 382.)

At an early period this court said:

> The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is with strict propriety applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. (*Worcester* v. *Georgia*, 6 Pet., 536.)

In a more recent case it was said:

> The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and the Senate, or through acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. (*Elk* v. *Wilkins*, 112 U. S., 108.)
>
> "While the Government of the United States has recognized in the Indian tribes heretofore a state of semiindependence and pupilage, it has the right and authority instead of controlling them by treaties, to govern them by acts of Congress, because they are within the geographical limit of the United States, and are necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in

> contact." * * * The United States recognized *no right in private persons*, or in other nations, to make such a purchase (of the ultimate title in the land) by treaty or otherwise. With the Indians themselves *these relations are equally difficult to define.* They were, and always have been, regarded as having a semiindependent position *when they preserve their tribal relations;* not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided. * * * *The relation of the Indian tribes* living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character. (*U. S.* v. *Kagama*, 118 U. S., 382.)

It has no relation or dealings with individuals except as they are members of such nation, tribe, or band.

> States, in the eye of international law, absord the citizens which constitute them. International law knows nothing of the individual members of States in their citizen capacity. Personal or private rights are *juris gentium*, and are internationally recognized; but citizen or public rights—the rights which are defined and measured by the public laws of separate States—are *juris gentis*, and are wholly and exclusively municipal. * * * And as of right, so of duties. The citizen as such has no international obligations or responsibilities. His obligations are to his own State, and are the counterpart of the rights which he has to its protection. But against other States, it is through his State alone that he can assert his rights; and it is his State that is

responsible for his actions. (Lorrimer, Institutes of the Law of Nations, vol. 2, pp. 130–132.)

The origin of the right which one nation has to adopt as its own claim, and to demand indemnity from another nation for the injury done to an individual, is that the individual being a member of the body politic and a representative *pro tanto* of his nation, the latter receives an injury whenever the person or the property of such individual suffers injustice; but if the injured person is not its citizen, or is not under her protection, everything that occurs is to the nation *res inter alios acta*, to which the principle of law applies, "*Aliis nec nocet nec prodest.*"

And the converse of the proposition is equally true; namely, that until it can be shown that a citizen of a particular State, or some individual for whose acts a particular State is responsible, has committed the acts or injuries complained of, no claim for redress by the demanding State is ever entertained or allowed.

It thus appears that the United States bears a dual relationship to the Indians living in tribal relations, which results from the twofold character in which it has habitually conducted intercourse and treated with them. At one time and under certain conditions—regarding them in their semisovereign capacity—it has treated with them on a footing of equality such as obtains between independent nations. At another time and under different conditions—regarding them as occupants in their tribal relations of lands wholly within its sovereign jurisdiction and dominion, and so under its protection—it has treated them as wards subject to guardianship, to

whose protection it is committed and for whose acts under certain conditions it admitted liability to respond.

Under the first condition the relation has an international feature, and many of the laws which govern the intercourse of independent states apply. Under the second condition the relation has a domestic internal feature, and is governed in many particulars by the rules of law which apply to the domestic relations, such as guardian and ward, master and servant, to which the maxim applies, *Respondet superior*. It is important to bear in mind the peculiar and cardinal distinctions which mark the relations of the Indians to the United States, because far-reaching consequences flow from this distinction. Under the international aspect, a state of war or peace must at all times be existent, and the one or other condition will limit and qualify the liabilities, duties, and obligations, respectively, of the parties. In considering these relations, however, there is another party or class of individuals of whom account must be taken when their rights are directly involved and affected, and these are citizens of the United States. But in whatever character the liability of the United States to indemnify its unoffending citizens on account of Indian depredations be regarded, whether as sovereign, responsible for the acts of its semi-independent aborigines, or as in the capacity of guardian to its wards, the *liability is secondary*, and can not be established against it until the aborigines committing the act complained of have been identified as members of some tribe, band, or nation in amity with the United States. Under all the differing conditions,

whether during a state of peace or of war, it must be borne in mind that the United States, as sovereign, is dealing with the Indian aborigines as a *nation*, *tribe*, or *band*.

The attention of the court is invited to consider the international feature in the relations of the United States and the Indians in tribal relations, because, in view of counsel for appellant, it furnishes a key and explanation to all the legislation of Congress relating to the subject-matter and the parties—a key and explanation of the earliest act (May 19, 1796), of the act of June 30, 1834, which is the basis of the act of March 3, 1891, under which this suit is brought, and of the act of March 3, 1891.

At the same time it is necessary to bear in mind the domestic feature in this relation, by virtue of which the United States regards itself as the guardian of its Indian wards.

In all the statutory provisions having reference to the relations existing between the sovereign and its citizens and Indian wards or dependents, the protection of the Indians in tribal relations against the unlawful encroachment of the white citizen and settler and the protection of the white citizen or settler against the encroachment of the Indian ward or dependent in tribal relations is kept in view. The measure and extent of the liability of the sovereign to such citizen or ward, respectively, is correspondent to the obligation which is imposed by the relation. And while it may not be uniform and similar

in respect to both citizen and ward, it has limitations and qualifications as to both, according to the actual conditions which are incident to a state of war or peace. In other words, the liability of a sovereign to protect its citizen is different under the different circumstances which result from a state of war or of peace. Hence the requirement of the act (March 3, 1891, sec. 1) that the band, tribe, or nation whose members have committed the depredation shall be found to have been in amity with the United States before the jurisdiction of the Court of Claims attaches.

The general policy of the United States and of all governments is not to pay for *property destroyed in war*. (See act of 1887, March 3, ch. 359, sec. 1, first *proviso*, 1 Sup. Rev. Stat., 2d ed., p. 559, and *Loranger's Case;* opinion of Court of Claims by Judge Blackford, A. D. 1857, Thirty-fifth Congress, first session, Rep. C. Cls., No. 96.)

By reason of the relation of the United States as guardian of its Indian wards, Congress from an early period has recognized some condition of liability on the part of the sovereign to its unoffending citizens on account of the unlawful acts of its wards, and has, in several statutes, manifested its purpose to provide a remedy and give relief. These acts evidence a consistent purpose to accomplish this result by legislative enactments, which should be based upon two leading considerations: First, the obligation to restrain its wards from the committal of offenses

against its citizens; and, secondly, failing in this, to provide for the pecuniary indemnification of its citizens by charging the depredations against any annuity, fund, or credit, past or prospective, of such wards. The earlier acts were all in this direction, but fell short of furnishing adequate relief to the unoffending citizens thus injured. And it was not until the passage of the act of March 3, 1891, that a complete remedy was provided by Congress. But the condition of liability and the circumstances under which such liability on the part of the sovereign was recognized and assumed was, in all essentials, on the lines which had been set out in the several statutes preceding the act just above mentioned.

Acts of Congress which have special reference to claims on account of Indian depredations appear on the statute book at a very early period, and are twelve in number (May 19, 1796, sec. 14, 1 Stat. L., 472; March 3, 1799, sec. 14, 1 Stat. L., 747; March 30, 1802, sec. 14, 2 Stat. L., 143; June 30, 1834, sec. 17, Stat. L., 731; February 28, 1859, sec. 8, 11 Stat. L., 401; June 25, 1860, 12 Stat. L., 120; July 15, 1870, sec. 4, 16 Stat. L., 360, sec. 2098, Rev. Stats.; May 29, 1872, sec. 7, 17 Stat. L., 190; secs. 445 and 466, Rev. Stats.; sec. 2156, Rev. Stats.; March 3, 1885, 23 Stat. L., 376; May 15, 1886, 24 Stat. L., 44; March 3, 1891, 1 Supplement to Rev. Stats., 2d ed., p. 913).

The acts of 1796, 1799, 1802, 1834 recognize the liability of the United States to its citizens on account of property taken or destroyed by "any Indian or Indians belonging to any tribe in amity with the United States," under circumstances specially set out.

The several prior acts, as well as the act of 1891, have an international feature which it is necessary to bear in mind when endeavoring to ascertain the intention of Congress, with a view of placing a proper interpretation on language which occurs in these several acts. This international feature is further indicated by consideration of the acts themselves in the light of the history of the times and the surrounding circumstances which led to their enactment.

The subject-matter is identical, and the parties to the suits appear in correspondent character as litigants, the subject-matter being claims arising out of Indian depredations covering a long period of time, and the parties to the suit being citizens of the United States on the one hand and the United States and co-defendant Indians on the other.

The international aspect is the result of the peculiar relations existing between the Indians in their tribal relations, as semiindependent nations on the one hand and the United States as a sovereign on the other. All these acts recognize this relation, and the cardinal provisions of the acts emphasize it. All these acts require proof of amity on the part of the Indian tribes with the United States, whose members shall have committed the acts complained of before any condition of liability is assumed by the United States or indemnification guaranteed. The relation of amity can only exist between independent or semiindependent nations.

The act of March 3, 1891, was not passed under a sudden inspiration, but was enacted with reference to the

policy of the Government and prior legislation in respect to the same subject-matter, which covered a period of nearly one hundred years. It was the culmination in a single statute of the substantive provisions of several prior statutes in regard to its subject-matter and parties, with the addition of provisions referring the generic depredations to the Court of Claims for adjudication.

The essential conditions which are required by the jurisdictional act, and failing which no pecuniary indemnity can be recovered, are, first, the petitioner must have been a citizen of the United States at the time of the depredation, and must not have given any just cause or provocation for such depredation; second, the petitioner must prove the loss and the value of the property, and that the same has not been returned or paid for; third, the petitioner must prove that the depredation was committed by a member or members of a band, tribe, or nation of Indians at the time "in amity with the United States."

> The act under which the suit was brought did not allow any claim nor create any liability upon the part of the Government. It merely provides a method of adjudicating claims which existed under statutes extending back to so remote a period as 1796. The trade and intercourse laws with the Indians of 1834 are, however, the basis of the act of March 3, 1891, which merely provides in conferring jurisdiction upon the Court of Claims a method

> of treating claims existing at the time and converting a contingent liability of the United States into an absolute payment from the Treasury. In the language of an eminent man in public life who was one of those most responsible for the passage of the law, the jurisdictional act of 1891 did not "create an obligation on the part of the United States to pay one dollar which it was not before the passage of that statute bound to pay eventually." (Opening brief of appellant, p. 7.)

It is important to bear this proposition submitted by appellants in view, because as to this point the appellants and appellees are squarely at issue. The contention as to this by the appellee in his brief (p. 5), is thus stated when referring to the prior acts of Congress:

> The former laws are doubtless the foundation for what Mr. Justice Brewer, by a happy and graphic expression in giving the opinion of the court in the Leighton Case, termed "the condition of liability" of the Indian tribe committing the wrong, while the latter is the foundation for "the condition of liability" of citizenship of the claimant. But these acts, or any of them, or all the acts *in pari materia* taken together do not furnish a complete guide for the procedure under this act or liability of the United States or of the Indian tribes. The procedure under this act is radically and essentiallly different from that under any and all the preceding acts, and the liability more fixed and broader. By this act the United States is for the first time made a direct party defendant to each and every suit, thus becoming primarily liable, and as expressed by this court in the Leighton Case, in what seems to appellee to be a true interpretation on this point, "in case of an

> award by the Court of Claims the United States becomes in fact, if not in form, the primary and solvent debtor." But on the other hand the United States is by this act for the first time empowered to set up "any counterclaim, set-off, claim for damages, or demand" it may have, as well as those of the Indians against these depredation claims.

It is conceded that the act of March 3, 1891, authorizes the Court of Claims to entertain suit and to render judgment against the United States and its codefendants, Indians, being members of a band, tribe, or nation of Indians in amity with the United States at the time of the depredation, on account of any property belonging to a citizen of the United States taken or destroyed by a band, tribe, or nation of Indians, or by members, Indians belonging to such band, tribe, or nation, in the absence of just cause or provocation by said owner or his agent.

It is denied that the act authorizes the Court of Claims to entertain suit or enter judgment against the United States alone on account of property taken or destroyed by an Indian or Indians unconnected with some band, tribe, or nation of Indians. And this denial is based upon examination of the various provisions of the act of March 3, 1891, and of the provisions of the prior acts of Congress relating to the same subject-matter and parties, which, it is submitted, only recognizes a condition of limited liability on account of depredations committed by Indians upon citizens of the United States.

This condition of liability is limited by the unbroken usage of the Government and by express provisions contained in the several acts of Congress, and it results from the peculiar relation which exists between the United States as a sovereign and the band, tribe, or nation of Indians as "domestic dependent nations." It is fairly inferable from the argument on behalf of appellee that appellant's construction in respect of the limitation of the jurisdictional act may find support in the language of prior acts of Congress, which are dismissed from present consideration in this wise:

> But these acts, or any of them, or all the acts *in pari materia* taken together, do not furnish a complete guide for the *procedure* under this act *or the liability of the United States or of the Indian tribes. The procedure* under this act is *radically and essentially different from that under any and all the preceding acts*, AND THE LIABILITY MORE FIXED AND BROADER. By this act the United States is *for the first time* made a direct party defendant to each and every suit, THUS BECOMING PRIMARILY LIABLE. * * *
>
> *In the matter of procedure* this is a marked departure from all former acts, and that seems to have misled counsel for appellant in his attempt to cast this act in the form of prior acts. He confused the "*condition of liability*" under the act of 1834 with the manner of presenting claims under that act. The "condition of *liability*" that the Indian depredators must belong to some tribes in amity with the United States is preserved intact under this statute; but the manner of presenting claims is specifically waived by section 2.

The act of 1834 provided that the claimant or his agent, may make application to the superintendent, agent, or subagent of the Indians, who, under the direction of the Secretary of the Interior, made application to the Indian tribe for payment. Few if any claims were presented in the manner prescribed in that act, and the procedure under it became inoperative chiefly because the Indians, almost universally, denied all knowledge of the theft, and such presentation was a fruitless effort to collect. *The actual procedure* under the prior acts was to present the claim direct to the Interior Department of the Government through the Commissioner of Indian Affairs. Section 2 of the act of 1891, having a view to the fact that claims had not been presented in the *manner* prescribed in prior acts, specifically *waived* the manner of presenting claims under those acts.

That all questions as to limitations as to time and *manner of presenting claims* are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or *other officer* or department of the Government. (Argument for appellee, pp. 5, 6.)

The italics in above citation from the printed argument of appellee are mainly ours.

It seems clear from the language of appellee that his argument only goes to the extent of establishing the point that in the *matter of procedure* the act of March 3, 1891, is a departure from all former acts, but it does not support a claim for *jurisdiction*. The proposition that the liability of the United States or of the Indian tribes is more fixed and broader under this act than it was under the

former acts is one of the points in issue between appellant and appellee, which is examined at some length in the opening brief of appellant. And counsel have failed in their purpose if it has not already satisfied the court that certain cardinal and essential requirements must be established by proof before any primary and sole liability can be said to be recognized or assumed by the Government under the various acts of Congress relating to claims founded on depredations committed by bands, tribes, or nations of Indians, or members of such bands, tribes, or nations in amity with the United States against the property of its citizens.

Bearing in mind the foregoing considerations, it is submitted that the several provisions of the latest act of Congress can be so construed as to consist and harmonize with the purpose of Congress as manifested in the earlier acts. There are some expressions in the jurisdictional act which, segregated from the other provisions and considered alone, may seem to give some support for the contention of the appellee. These expressions are relied on by the learned justice who rendered the opinion in the Court of Claims as justifying the conclusion reached by that court. Section 3, which relates to the petition, requires the claimant to set forth in his petition the facts upon which this claim is based, "the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed *as near as may be*, the property lost," etc.

Section 5 provides—

> That the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, *if possible*, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, *when such can be identified*.

Section 6 provides—

> That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner.

The first expression which it is argued sustains the contention of appellee is found in section 3 and is the qualifying clause "as near *as may be*."

As to this, it seems only necessary to say that the quoted clause is contained in a section relating entirely and solely to the petition, and that it furnishes a rule for the guidance and observance of the claimant at the time of the institution of his suit. It has no jurisdictional quality. Without this section (in the act) it would have been competent for the court to make a rule expressed in identical language. As a matter of fact, the draftsman of the petition is frequently only able to make general averments, and must rely upon the ascertainment and proof of material facts by way of amendment *after* institution of suit. And further, as was said in our opening

brief, this expression does not occur in the jurisdictional clauses of the act. The next expressions are contained in the concluding clause of section 5. This section relates to the duties of the court, and authorizes it to make rules and regulations for taking testimony, etc.

It is contended on behalf of appellee that the qualifying clauses "*if possible*" and "*when such can be identified*" authorize the court to render judgment against the United States alone in case its codefendants can not be identified. The reply to that contention must be that such construction would be inconsistent with the evident intention of Congress as manifested in the several successive statutes relating to Indian depredations, and that it is manifestly inconsistent with the jurisdictional clauses of the act as insisted upon in our opening brief (pp. 6, 7).

The further contention on the part of the appellee (brief, p. 9, 8) is that *Indian depredators may be proved by circumstantial evidence;* and then proceeds to indicate the difficulty which would be encountered in case proof of the identification of particular Indians as belonging to some specified tribe, who at the time of the depredation were "in amity" with the United States should be required. But the obvious answer to this contention is that it is impossible to find *the fact of* "*amity*" without identification of individual Indians and their connection as members of some tribe, or band, or nation. There is a long list of Indian tribes and bands which have been

held by the Court of Claims *not* to be "in amity" with the United States at the time of various Indian depredations, on account of which claims have been instituted under the jurisdiction act.

Counsel for appellee argues (brief, p. 5, 6, 7) that the prior acts "do not furnish a complete guide for the procedure under this act for the liability of the United States or of the Indian tribes. The procedure under this act," it is argued,

> is radically and essentially different from that under any and all of the preceding acts, and the liability more fixed and broader. By this act the United States is for the first time made a direct party defendant to each and every suit, thus becoming primarily liable, and as expressed by this court in the Leighton Case, in what seems to appellee to be a true interpretation on this point, "in case of an award by the Court of Claims the United States becomes in fact, if not in form, the primary and solvent debtor." But, on the other hand, the United States is by this act for the first time empowered to set up "any counterclaim, set-off, claim for damages, or demand" it may have, as well as those of the Indians against these depredations claims. (Section 4.)

It is precisely on this point that the appellants and appellee are at issue. It is denied on behalf of the appellants that its liability is more fixed and broader under the act of March, 1891, than it was under provisions of the prior acts and particularly the act of June 30, 1834 (4 Stat. L., 731), relating to the trade and intercourse laws with the Indians, which, as argued in our opening brief (p. 7), is the basis of the act of March 3, 1891.

The latter act "merely provides in conferring jurisdiction upon the *Court of Claims a method of treating claims existing at that time and converting a contingent liability of the United States into an absolute payment from the Treasury.*"

The brief citation by counsel for appellee from the opinion of this court in the Leighton Case, which, it is argued, fixes a primary liability on the part of the United States, is predicated of the case of an award by the Court of Claims, where the Indians have been identified with some tribe, band, or nation, and does not fortify the argument of appellee in support of the jurisdiction in the case at bar. The condition of liability prescribed in the jurisdictional clause of the first section does not exist, because by the finding the Indians who committed the depredation could not be said to belong to a *tribe* in *amity* with the United States. The concluding sentence of the first finding of fact, which is in these words:

"It does not appear at the time of the depredation that any Indian troubles existed" does not satisfy the requirement of the first paragraph of the jurisdictional clause set out in the first section. The requirement of the jurisdictional clause that the property appropriated or destroyed by Indians belonging to any band, tribe, or nation in "amity" with the United States is not satisfied by a statement of a qualified negation such as that quoted from the first finding of fact. This provision requires affirmative proof that the band, tribe, or nation whose

members committed the depredation were "in amity," and it places the burden of proving this fact upon the claimant. But even if regarded as a statement of fact, it is open to a review in this court.

> A statement of facts in this court must be a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. (*Burr* v. *Des Moines, etc.*, 1 Wall., 99.)
>
> A judgment of the court of claims as to the legal effect of the ultimate circumstantial facts in a case may be reviewed in this court. (*U. S.* v. *Pugh*, 99 U. S., 265; see also *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S., 511.)

The following provisions, which run through the several acts of Congress, and which occur in section 6 of the act of March 3, 1891, throw much light upon the intention and evident purpose of Congress in respect to the condition of liability of the United States and the defendants, respectively. They are the provisions with reference to the charge against these claims upon *the annuities* due to the several tribes from the United States. These provisions are set out in section 6:

> *That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by the members of which, the court shall find that the depredation was committed,* and shall be deducted in the following manner:
>
> First. From annuities due said tribe from the United States.

Second. If no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise.

Third. If no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence, and education; and,

Fourth. If no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States.

Provided, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund, or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

As sovereign the United States is responsible to its citizens for protection, and the tribe, band, or nation of Indians is responsible to the United States for the wrongs and depredations of those who belong to it.

Where the United States assumes liability on account of, or pays a claim for, injuries or depredations inflicted upon its citizens by an individual or individual Indians "belonging to a tribe, band, or nation," the tribe, band, or nation must answer over, when it can be identified, to the United States. On the other hand, it would be as unreasonable as unjust to compel a tribe, band, or nation

of Indians to answer for an injury committed by individuals not belonging to the tribe, band, or nation, and hence not amenable to their physical authority. Hence, the character of the claim for which pecuniary indemnification is authorized by section 1 of the act of March 3, 1891, is a claim on account of property of citizens of the United States taken or destroyed *by Indians "belonging to any band, tribe, or nation;"* that is, so connected with "the band, tribe, or nation" by some vinculum which renders it a member.

The effect of the suit is to raise a controversy between the United States on the one hand and the codefendants on the other as to the question of appropriation or destruction by members of that tribe to the property of the claimant.

The judgment determines the special controversy thus raised, and this judgment, if against the codefendants of the United States, fixes, of course, the band, tribe, or nation liability to the United States as effectually as the same judgment—which is also against the United States—fixes the liability of the United States to the claimant, with this distinction: That whereas the United States must pay the judgment in money directly to the claimant, unless the judgment be reversed on appeal, the band, tribe, or nation against whom the judgment is also awarded are to have a general charge entered against them in the amount of the judgment on account of any annuity, fund, or credit, present or prospective, it may have with the Government.

As between the band, tribe, or nation on the one hand and the Government on the other, the former is principal and the latter is surety.

CHARLES B. HOWRY,
Assistant Attorney-General.
ALEXANDER PORTER MORSE,
Assistant Attorney.

APPENDIX.

Act June 30, 1834 (sec. 17, 4 Stat. L., 731), provides, "That if any Indian or Indians belonging to any tribe in amity with the United States shall within the Indian country take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time—not exceeding twelve months—it shall be the duty of such superintendent, agent, or subagent to make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be

Act March 3, 1891 (26 Stats., 851): That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

Second. Such *jurisdiction* shall also extend to all cases which have been examined and allowed by the Interior Department; and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and

proper, in the opinion of the President, to obtain satisfaction for the injury; and, in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party so injured an eventual indemnification: *Provided*, That if such injured party, his representative, attorney, or agent, shall in any way violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided also*, That unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom and paid to the party injured; and if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the Treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.

under subsequent acts, subject, however, to the limitations hereinafter provided.

* * *

That all questions of limitation as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government.

Provided, That no claim accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the court unless the claim shall be allowed or has been or is pending prior to the passage of this act before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, subagent, or commissioner authorized under any act of Congress to enquire into such claims; but no case shall be considered pending unless evidence has been presented therein.

* * *

That all claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe, or tribes, or bands of Indians by whom the alleged illegal acts were committed, as near as may be the property lost or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved. The petition shall be

verified by the affidavit of the claimant, his agent, administrator, or attorney, and shall be filed with the clerk of said court. It shall set forth the full name and residence of the claimant, the damages sought to be recovered, praying the court for a judgment upon the facts and the law. (Sec. 30.)

* * *

That the said court shall make rules and regulations for taking testimony in the causes herein provided for, by deposition or otherwise, and such testimony shall be taken in the county where the witness resides, when the same can be conveniently done.

And no person shall be excluded as a witness because he is party to or interested in said suit, and any claimant or party in interest may be examined as a witness on the part of the Government.

That the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, *if possible*, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, *when such can be identified.* (Sec. 5.)

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In the Supreme Court of the United States.

Office Supreme Court, U. S.
FILED.
JAN 28 1897
JAMES H. McKENNEY,
CLERK.

OCTOBER TERM, 1896.

165-316

THE UNITED STATES, *Appellant*,

vs.

JOSHUA GORHAM, *Appellee*.

No. 187

MOTION SUGGESTING THE DEATH OF THE APPELLEE.

Now comes John Wharton Clark, the attorney of record in this case for the Appellees and attorney in this case for Joshua Gorham, deceased, during his lifetime, and suggests the death of Joshua Gorham during the pendency of this suit in this Court, and asks that the following named heirs, the same being all the legal heirs of the estate of Joshua Gorham, deceased, be substituted as Appellees in this cause in lieu of Joshua Gorham, deceased, to wit: John T. Gorham, William P. Gorham and Celeta C. Ozment joined by her husband, James J. Ozment, all residents of Cooke County, Texas, and Nancy J. Harger joined by her husband, George A. Harger, residents of Cass County, Missouri.

JOHN WHARTON CLARK,
Attorney for Appellee.

The Court is asked to substitute the above named heirs of Joshua Gorham, deceased, instead of the legally appointed Administrator as is usual in such cases because the knowledge of the death of Joshua Gorham came to counsel as recently as December last, and then this case was expected to come up for hearing any day. Counsel wrote to the heirs to have an administrator appointed, and was informed that the Probate Court of Cooke County, Texas, did not convene until January, and knowing that the case would be passed if reached in its present condition concluded to suggest the heirs.

Section 9 of the Indian Depredation Act of 1891, provides that payment shall be made "to the claimant, his lawful heirs," etc., and excludes all rights of assignees so that no one can be injured by this substitution. J. W. C.